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Supreme Court, U.S.
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85-2079

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.,
Petitioners,

VS.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE

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QUESTION PRESENTED

Does a United States District Court have jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions?

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BRIEF OF AMICUS CURIAE

INTEREST OF CARPENTERS SOUTHERN CALIFORNIA ADMINISTRATIVE CORPORATION, INC.

Carpenters Southern California Administrative Corporation, Inc. ("CSCAC"), is a non-profit corporation organized under the laws of the State of California for the purpose of administering the Carpenters Health and Welfare Trust for Southern California, the Carpenters Pension Trust for Southern California, the 11 County

Carpenters Vacation Savings and Holiday Plan, and the Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Carpenters Trusts"). The Carpenters Trusts are multiemployer employee benefit plans established pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 186(c)(5) and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208.

The Carpenters Trusts were created by a collective bargaining and trust agreements between the Associated General Contractors of California, Inc., the Building Industry Association of Southern California Inc. and the Southern California Contractors Association, Inc. and the District Councils and Local Unions in the Eleven (11) Southern California Counties affiliated with the United Brotherhood of Carpenters and Joiners of America.

Among its various functions and duties, CSCAC monitors the compliance of over 8,000 signatory employers participating in the various multiemployer trusts which it administers. When necessary, CSCAC brings suit in both federal and state courts to enforce the provisions of the collective bargaining and trust agreements and to ensure that the appropriate fringe benefit contributions are timely paid by the participating signatory employers.

The question presented for review in the Petition for a Writ of Certiorari is of the utmost importance to the thousands of carpentry employees and their dependents who are the beneficiaries of the various employee benefit plans which CSCAC administers. Consequently, CSCAC has a vital interest in seeking review of the lower court's decision. If that court decision is left intact, CSCAC will be effectively hamstrung in its efforts to monitor and

compel compliance of the obligations imposed on the employer in all post-termination, pre-impasse situations. If CSCAC is foreclosed from bringing suit in the United States District Court to enforce post-termination, pre-impasse obligations and to collect delinquent fringe benefit contributions, the inevitable drain on trust assets could devastate the financial integrity of the Carpenters Trusts and cause incalculable harm to the beneficiaries of the trusts and their dependents.

Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The decision below raises issues of extreme significance. The Petition for a Writ of Certiorari filed by Petitioner fully discusses the policies, language, legislative history and comprehensive statutory scheme of ERISA, 29 U.S.C. §§ 1001-1461, as amended by MPPAA. Additionally, the Petition adequately discusses how the decision below conflicts with other decisions of this Court. CSCAC strongly adopts the views put forth by Petitioner.

In this brief, we will focus on the inadequacy of the National Labor Relations Board (the "Board") as a forum for the collection of post-termination, pre-impasse fringe benefit contribution delinquencies.

ARGUMENT: REASONS FOR GRANTING THE WRIT

The Board, While Providing an Adequate Forum for Resolving Labor-Management Disputes and Remedying Unfair Labor Practices, is a Wholly Inadequate Arena for the Collection of Delinquent Fringe Benefit Contributions.

Congress would not impose upon the trustees of a multiemployer trust fund a fiduciary duty to maintain the fiscal security of the trust fund without providing an available and adequate forum in which to proceed. See *Laborers Health and Welfare Trust Fund v. Kaufman & Broad,* 707 F.2d 412, 416 (9th Cir. 1983). Implicit in the lower court's finding that section 515 of ERISA, 29 U.S.C. § 1145, does not provide for jurisdiction over actions seeking to recover post-termination, pre-impasse fringe benefit contribution delinquencies, is the conclusion that the Board would provide the trust funds with an *adequate* forum in which to obtain relief. For a plethora of reasons, this underlying assumption relied upon by the lower court is invalid. Accordingly, the lower court's ultimate conclusion is fatally flawed.

First, there is no guarantee that the Board will choose to exercise jurisdiction over charges filed by a trust fund. Generally, the Board will only exercise jurisdiction if a non-retail employer meets the jurisdictional standards by directly and indirectly purchasing goods and services valued above $50,000 from outside the state. *Snowshoe Company,* 212 NLRB No. 29 (1974). Many employers bound to contribute to the various trusts administered by CSCAC would not meet the Board's jurisdictional standards. Many small construction contractors would be able to evade their obligations to make trust fund contributions as the Board would decline to exercise jurisdiction over them. Moreover, even when the employer meets the

Board's jurisdictional standards, the Board is not required to exercise its jurisdiction. The Board has the discretion to refuse to entertain certain disputes. 29 U.S.C. § 164(c)(1) provides:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

The Board has expressed a reluctance to be used as a collection agency for trust funds. In *Rapid Fur Dressing, Inc.*, 278 NLRB No. 126 (1986), the Board found that an employer who unilaterally ceased to make contractually required payments to a trust fund violated sections 8(a)(5) and (1) of the National Labor Relations Act ("NLRA"). In dissenting, Chairman Dotson stated, "It is an unwise policy for the Board, with its heavy workload, to serve as a monitor for contract compliance. . . ." In *Can-Do, Inc.*, 279 NLRB No. 108 (1986), Chairman Dotson reiterated his opposition to the Board "allowing itself to be used as a collection agency."

It is unlikely that a trust fund would find a receptive forum in the Board. Especially in light of the backlog of cases faced by the Board. In an article for the *Labor Law Journal*, Chairman Dotson wrote:

> As of [December] 1, 1983, the backlog (the cases on hand) was [1355] C cases . . . and [326] R cases . . . ,

> representing the largest volume of cases in the agency's history.
>
> * * *
>
> Concurrent with the growing number of pending cases, the Board has issued fewer decisions and, I must report, has taken longer to issue them.

35 Lab. L.J. 5 (1984).[1]

Because of the backlog of cases before the Board, it may decide that collecting delinquent contributions for thousands of employers detracts its attention from what it perceives to be more significant matters.

If the Board refuses to be used as a collection agency or is unable to effectively handle the increased workload the trust funds will be without a remedy. Should the Board refuse to issue complaints the trust funds will not be able to seek review by the courts. Therefore, there is no guarantee that trust funds will have an available forum to recover delinquent contributions owing after the expiration of a collective bargaining agreement.

Second, the Board's six-month Statute of Limitations, 29 U.S.C. § 160(b), is impractical and imposes an impossible burden upon the trust funds. In a typical unfair labor practice situation, both the charging and charged party will have first-hand knowledge of the underlying

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[1]The huge backlog of cases pending before the Board creates an additional burden for trust funds. The delay in collecting contributions by the Board would result in the loss of investment income that could be earned if contributions were quickly recovered. Participants and beneficiaries of the trust funds suffer by receiving lower benefits. Employers who make the required contributions will suffer by being required to pay increased contribution rates and the potential withdrawal liability of employers may increase.

facts giving rise to the filing of the charge. However, in cases involving trust funds, such is not the case.

The Carpenters Trusts are not parties to the collective bargaining and trust agreements; they are simply the third-party beneficiaries of those agreements. Typically, the trust funds do not have a daily working relationship with either the Union or the employer. See *NLRB v. Amax Coal Company,* 453 U.S. 322 (1981); *Schneider Moving & Storage Company v. Robbins,* 466 U.S. 364 (1984). Consequently, the trust funds would rarely have any first-hand knowledge of the commission of an unfair labor practice by the employer.

A typical scenario will illuminate the trust funds' predicament: An employer opts to terminate his collective bargaining agreement, begins to negotiate with the Union and continues to submit fringe benefit contributions. Notice of the termination is required to be sent to the Union, *not* the trust funds. Consequently, unless either the employer or the Union subsequently notifies the trust funds of the termination, the trust funds have no notice that the employer has terminated.

Since the employer continues to submit fringe benefit contributions to the trust funds, for all intents and purposes that employer would appear to be no different from an employer who had not terminated. Absent notice, the trust funds have no practical way of distinguishing between the two classes of employers. The six-month Statute of Limitations could run long before the trust funds learned of the termination of the collective bargaining agreement.

Assuming *arguendo* that the trust funds will always be notified of the termination of a collective bargaining agreement, the six-month Statute of Limitations would nevertheless impose an insurmountable obstacle to a trust

fund. Typically, the only method the trust funds have at their disposal to verify an employer's compliance with the provisions of the collective bargaining agreement with respect to fringe benefit contributions, is through an audit of the employer's books and records. In the example above, as long as contributions were made the employer would appear to be complying with §§ 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(5). However, until an audit of the employer's books and records can be conducted, it cannot be accurately ascertained whether the employer is in compliance or has committed an unfair labor practice. Meanwhile, the clock of the Board's six-month Statute of Limitations is relentlessly ticking.

The trust funds will be placed between Scylla and Charybdis. In order to adequately protect itself (and the beneficiaries) the trust funds would be forced to file an unfair labor practice charge against every employer who has tendered a termination to the Union, regardless of whether the employer appears to be properly paying the requisite fringe benefit contributions. Or they would have to bear the enormous expense of conducting a continuing audit of each terminating employer. Until such time as an audit can be conducted, the Carpenters Trusts cannot know whether an unfair labor practice has occurred.

To further compound the problem, negotiations can continue for months, and in some situations, years. Trust funds will be required to ascertain the status of countless negotiations. Every six months, the trust funds would be forced to file new unfair labor charges with the Board or continue monitoring the employer's records. Failure to do so could expose the trustees to a charge of neglection of their fiduciary duties. See *Kaufman & Broad, supra.*

The Carpenters Trusts have been made aware of approximately one hundred (100) employers who have ter-

minated their collective bargaining and trust agreements with the Union as of July 1, 1986. If the lower court decision is allowed to stand, the Carpenters Trusts will be forced to file approximately 100 unfair labor practice charges with the Board; many of which will have no apparent basis in fact, but which have to be filed to protect against the running of the Board's Statute of Limitations, or employ scores of auditors to quickly begin auditing the terminating employer's records. If the lower court ruling is allowed to stand, the Board will be inundated, nationwide, with thousands of unfair labor practice charges filed by multiemployer trust funds, solely to protect against the running of the Board's six-month Statute of Limitations. As stated above, this would substantially increase the workload of an already overworked Board.

Third, there is a substantial difference in the remedies available to a trust fund before the Board or the courts. In the courts, a trust fund is entitled to recover the unpaid contributions, interest on the unpaid contributions, an amount equal to the interest on the unpaid contributions or liquidated damages provided for under the plan, and reasonable attorneys' fees and costs of action. 29 U.S.C. § 1132(g)(2). When Congress enacted ERISA it was aware of the losses a trust fund incurs when contributions are not paid in a timely fashion. The trust fund loses the benefit of investment income plus incurs increased administrative costs in detecting and collecting delinquencies. Accordingly, Congress provided for a full array of available remedies.

The purpose of the NLRA, however, is remedial. *Wisconsin Department of Industry, Labor and Human Relations v. Gould,* 475 U.S. ____, 106 S.Ct. 1057, 1062 n. 5 (1986). The Board's make whole remedy would allow only for the recovery of unpaid contributions and would not

include double interest or liquidated damages or attorneys' fees. Such a remedy would not fully compensate a trust fund for its loss of investment income or its increased administrative costs.

The NLRA's remedial philosophy poses a further problem for trust funds. Once an unfair labor practice charge has been filed, the investigation, issuance of a complaint, prosecution of the case and enforcement is conducted by the Board. 29 C.F.R. §§ 101.2, 101.4, 102 *et seq.* The trustees of the trust fund, who are charged with maintaining the fiscal integrity of the fund, have no control over the action. The Board could refuse to issue a complaint. Or the Board could agree to a settlement even over the objections of the trustees. 29 C.F.R. § 101.9(c). The Board has no fiduciary duties to the participants and beneficiaries of the trust fund. Therefore, if, in the Board's view, a settlement would effectuate the purpose of the NLRA a matter will be settled despite the loss to the trust fund.

Fourth, because the Board controls the investigation and prosecution of charges, trust funds will lose their ability to conduct audits. This Court, in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. ____, 105 S.Ct. 2833, 86 L.Ed. 2d 447 (1985), upheld the right of trustees to conduct audits and emphasized the importance of audits.

Most trust funds are experienced in the auditing of employer's books and records and have developed sophisticated in-house auditing programs or utilize auditing firms to verify an employer's compliance with the terms of the agreements. The Board lacks such expertise. It is impossible for a Board Agent, untrained in accounting principles, to conduct a thorough investigation. Consequently, many employers will be able to avoid liability

simply because of the Board's lack of expertise and resources.

Fifth, the requirement imposed by the lower court to file charges with the Board would require that a multiplicity of actions be brought by the trust funds. Suits to collect pre-termination delinquencies would be brought before the United States District Court. Post-termination, pre-impasse delinquencies would of necessity be brought before the Board. Congress could not have envisioned this result when it enacted the MPPAA seeking to insure a quick and inexpensive means for collecting delinquent contributions.

Post-liability suits to collect withdrawal liability would be brought before the United States District Court. Both pre-impasse delinquencies and withdrawal liability cases necessarily decide the issue of when and if impasse was reached. It is conceivable that the Board and the court may reach conflicting results. Although the lower court in the instant case reasoned that the Board had the particular expertise to decide the perplexing issue as to when impasse was reached, the lower court ignored the fact that the District Court must make the same analysis in determining whether an employer has any withdrawal liability. As the issue is identical, it defies logic to assert that in the one situation the District Court possesses the expertise to resolve the issue, while in a second situation requiring the same analysis, the Court does not possess the requisite expertise.

CONCLUSION

The decision of the Court below limiting the bringing of an action to collect post-termination, pre-impasse fringe benefit contribution delinquencies to the Board (to the exclusion of the federal District Courts) creates insurmountable obstacles preventing the trustees of multiemployer trust funds from the performance of their fiduciary duties. Additionally, the ruling below reaches a result which defies logic and opens the floodgates of litigation by demanding the needless filing of a multiplicity of actions in various forums to redress related wrongs. The issue is one of great legal and practical importance to multiemployer trust funds throughout the nation and should be decided by this Court.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 15, 1986, I served the within Brief of Amicus Curiae in re: "Laborers Health and Welfare Trust Fund for Northern California, et al. vs. Advanced Lightweight Concrete Co., Inc." in the United States Supreme Court, October Term 1985, No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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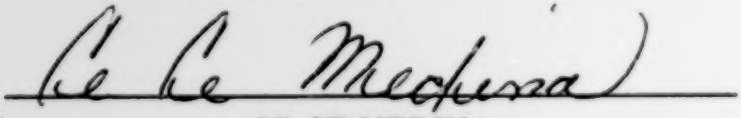
All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 15, 1986, at Los Angeles, California.



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